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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

149 MADISON AVENUE CORP. and WILLIAMS & CO., INC.,

Petitioners,

against

FRANK ASSEETA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETLESON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioner.

JOHN J. BOYLE,
of Counsel.

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Your petitioners, 149 MADISON AVENUE CORP. and WILLIAMS & CO., INC., respectfully pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above case on June 17, 1946, which affirmed a judgment in favor of respondents.

Opinions Below

The opinion of the District Court (R. 184-203) is reported at 65 F. Supp. 385. The opinion of the Circuit Court of Appeals (R. pp. 81-85) is reported in 156 F. 2d 139.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on June 17, 1946 (R. p. 86). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented

Pursuant to a Directive Order of the National War Labor Board made on July 29, 1942, an employers' association of which petitioners are members and a labor union of which respondents are members entered into a collective bargaining agreement (known as the National War Labor Board Agreement) fixing terms and conditions of employment for a large number of loft and office buildings, as well as apartments, in New York City, for the period April 21, 1942 to April 20, 1945. The Directive Order of the Board and the resultant collective agreement were made subsequent to the landmark decision of this Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, holding the Fair Labor Standards Act applicable to loft buildings tenanted by manufacturers producing goods for interstate commerce. Accordingly the employers and the union intended, as the War Labor Board recognized, to bring the wage and hour provisions of their agreement applicable to building service employees in loft and office buildings into compliance with that Act. For a regular workweek of 46 hours the agreement provided weekly earnings or "take home" pay which included all overtime compensation for the regular workweek. Hourly rates used in determining compensation when an employee worked less than or more than the regular workweek of 46 hours, were calculated by dividing the earnings for the regular workweek, by 49, being the sum of the hours in the regular workweek, *i. e.*, 46, and half the hours regularly worked

in excess of 40 per week, *i. e.*, 3, a formula which is nothing more than a restatement of the Act's overtime requirements. The agreement provided that it should not be construed to lower the hourly rate presently received by any employee (Pl. Ex. 1, Art. III, par. 2, p. 6). The Trial Court found that petitioners applied the hourly rates derived from the formula in "all situations" (R. 200).

The question presented is whether the method of calculating the regular hourly rate and the overtime rate provided by the National War Labor Board Agreement conforms to the requirements of Sec. 7(a) of the Fair Labor Standards Act of 1938 (Opinion of Circuit Court, R. p. 82).

More broadly viewed, the question is whether under the Act employers and employees can ever effectively agree what the weekly earnings or "take home" pay, inclusive of overtime, shall be for a regular workweek in excess of 40 hours, reducible by a clear formula to an hourly rate for the purpose of determining compensation when the hours worked are less than or more than the regular workweek; or whether the *Missel* formula ("Wage divided by hours equals regular rate", 316 U. S. 572, 580) is mandatory despite the contrary agreement and practice of the parties.

Statute Involved

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., Secs. 201, *et seq.*) are as follows:

> SEC. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * * *

(3) For a workweek longer than forty hours after the expiration of the second year from * * * (the effective) date (of this section), unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.

Statement

(a) *Preliminary*

Petitioners, owner and managing agent, employed respondents in a loft building in New York City. It is conceded that the work performed by respondents is covered by the Act (R. 220). While the original complaint covered the period October 24, 1928 to April 20, 1942, by amendment at the trial, the period was extended to December 10, 1943, being the date the action was commenced. The period which is now involved is April 21, 1942 to December 10, 1943, since all issues prior thereto have become moot (R. 214-225).

There was no oral testimony with respect to the phase of the case now involved. The facts with respect to the issues are found in two stipulations (R. 119-135, 1[illegible]-159) and five exhibits which are bound separately and handed up to this Court pursuant to agreement between the attorneys (R. 115-117).

It is stipulated that for the period, April 21, 1942 to December 10, 1943, respondents "were employed and paid in accordance with the terms and conditions of employment provided in a collective bargaining agreement known as the National War Labor Board Agreement" between Realty Advisory Board on Labor Relations, Inc., on behalf of the various signatory employers, and Local 32B, Building Service Employees International Union, A. F. of L., on behalf of the employees (Pl. Ex. 2, R. 120-122). That agreement fixed a regular workweek for employees,

other than watchmen, of 46 hours; for watchmen, of 54 hours. It also provided for weekly earnings for all workmen employed thereunder for the stipulated regular workweek, and stated that "it is the intention of the parties that the wages paid, as provided for in this agreement, * * * shall constitute full payment for services rendered under this agreement * * *" (Pl. Ex. 1, Article III, par. 6, p. 7).

In addition to providing for earnings for the regular workweek, the NWLB Agreement provided a method or "formula" for determining hourly rates which governed the payment of non-overtime and overtime where the hours worked were less than or more than the agreed regular workweek. Express hourly rates were also fixed for those employees having no regular workweek. It expressly provided an overtime rate of "at least time and one-half" for all hours worked in excess of 40 hours per week. Employees, other than watchmen, working more than 46 hours per week or more than 9½ hours per day, are paid "an overtime rate of time and three-quarters" for such overtime. Watchmen working more than 54 hours per week or more than 11½ hours per day, are paid double time (Pl. Ex. 1, "Hours And Hourly Rates", pp. 27 to 30).

It is clear, therefore, that the regular weekly earnings or wages directed by the War Labor Board and incorporated by the parties in their agreement included full payment for all overtime embraced within the regular workweek of 46 or 54 hours, as the case might be, and not merely payment for non-overtime hours. Failure to grasp this fact was the source of the basic legal error in the Trial Court's decision. The Trial Court in assuming (R. 198-199) that plaintiffs were employed for a fixed workweek at a fixed weekly wage, ignored the fact that the so-called fixed wage included overtime and was intended to be full compensation for such a workweek.

(b) *Background of Agreement*

Since 1934, a substantial number of owners of loft, office and apartment buildings, in the Borough of Manhattan have bargained collectively with Local 32B regarding the terms and conditions of employment of their building service employees. A brief history of this relationship and a description of the resulting agreements is set forth in the Report and Recommendations of the Mediation Panel of the National War Labor Board (Pl. Ex. 4, pp. 4 to 17 inclusive). More than 2,200 separate buildings, including approximately 700 loft buildings, have been involved. In these negotiations, there have been two distinct sets of agreements; one set (McGrady Agreement, February 4, 1939 to February 3, 1942; Meyer Agreement, February 4, 1942 to February 3, 1945) known as the Garment Center Agreements, between Local 32B and the Midtown Realty Association, Inc. and the Penn Zone Association, Inc., covering loft and office buildings in the Garment Area; the other (Sloan Agreement, April 24, 1939 to April 20, 1942; National War Labor Board Agreement, April 21, 1942 to April 20, 1945) between Local 32B and the Realty Advisory Board on Labor Relations, Inc., covering loft, office and apartment buildings elsewhere in Manhattan. The pattern of the two sets of agreements was naturally similar.

During the period April 24, 1939 to April 20, 1942, the respondents were employed pursuant to the Sloan Agreement (Pl. Ex. 2, R. 126; Pl. Ex. 3). Weekly wages of $24 for a 47-hour week (watchmen, 59 hours) were established for Class "C" loft buildings, that being the classification of the building in controversy (Pl. Ex. 3, pp. 11 to 14). The Sloan Award, following an interim arbitration of wages and hours called for by the basic agreement, resulted in the raising of the weekly wage for Class "C" lofts to $25 per week, effective October 20, 1940 (Pl. Ex. 4, pp. 12-13).

The Sloan Agreement contained no provision, express or implied, that the regular weekly wage included overtime and there was no provision for determining hourly rates. The only rates mentioned were weekly rates for various jobs and for classes of buildings. There was no provision for overtime between 40 hours per week and the regular workweek of 47 hours. The Sloan Agreement as well as the McGrady Agreement in the Garment Center were negotiated in 1939, at a time when both laymen and lawyers, entertained no serious thought that building service employees of independent landlords were "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act. See, *Fleming* v. *Arsenal Building Corporation*, 38 F. Supp. 207, Woolsey, J. (S. D. N. Y., April 11, 1941); *Killingbeck* v. *Garment Center Capitol, Inc.*, 259 App. Div. 691 (1st Dept. June 7, 1940), leave to appeal denied, 259 App. Div. 1076, 284 N. Y. 818.

The story of the tidal wave of retroactive liabilities which engulfed loft building owners and managing agents in New York City and throughout the nation after this Court decided *Kirschbaum* v. *Walling*, 316 U. S. 517, is well known.[4]

The Sloan Agreement provided (R. Ex. 3, p. 21) that by February 1, 1942 the parties would enter into negotiations for a new agreement. Meanwhile the decision of the Circuit Court of Appeals for the Second Circuit in *Flem-*

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[4] *Adams* v. *Union Dime Savings Bank*, 53 F. Supp. 782, aff'd 144 F. 2d 290 (C. C. A. 2, 1944), certiorari denied 323 U. S. 751, October 16, 1944; *O'Neil* v. *Brooklyn Savings Bank*, 267 App. Div. 317 (1st Dept., 1943), aff'd 293 N. Y. 666, aff'd 324 U. S. 697; *Gangi* v. *D. A. Schulte, Inc.*, 53 F. Supp. 844, reversed 150 F. 2d 694, aff'd U. S. , 90 Law ed. (Adv. op.) 873; *Borden Co.* v. *Borella*, 325 U. S. 679.

The estimated liability of building owners in New York City if the decision in the present case stands, exceeds $10,000,000. New York Sun, January 10, 1946, p. 12.

ing v. *Arsenal Building Corporation*, 125 F. 2d 278, entered the picture on December 30, 1941. This involved a building in the Garment Center under the Meyer Agreement which was due to expire on February 3, 1942. As a result the Union and the two Associations, in the Garment Area, after an arbitration before Mr. Arthur S. Meyer, Chairman of the New York State Mediation Board, entered into the Meyer Agreement, covering the period February 4, 1942 to February 3, 1945, which for the first time in the bargaining between Local 32B and the owners, fixed hourly rates governing the employment of all classifications of employees (Pl. Ex. 4, pp. 16-17; 33-34; 70-72).

Local 32B and the Realty Board commenced negotiation in March, 1942 for a new agreement to succeed the Sloan Agreement and the matter ultimately went before the National War Labor Board in Washington, D. C. (Pl. Ex. 4, pp. 6, *et seq.*). The Panel's Report which the Board adopted, states at pages 33 to 34:

> "It was understood at the hearing that if the Board set hours for office and lofts above the 40-hour maximum demanded by the Union, the parties would adopt the formulae of the Meyer Agreement for the calculation of hourly rates, and the fixing of overtime. These formulae were introduced because of the prospective application to loft buildings of the Fair Labor Standards Act. We quote and explain them in Appendix B. As they have been accepted in principle by the parties, we believe they should be incorporated into the present contract."

At the hearing before the Board it was understood and agreed that the new wages and hourly rates agreed upon by the parties or ordered by the Board, would be retroactive to April 21, 1942, when the Sloan Agreement expired (Pl. Ex. 4, p. 49; Pl. Ex. 2, R. 133).

(c) *Application of Hourly Rates under the Agreement*

Pursuant to the Directive Order (Pl. Ex. 4), the Union and the Realty Advisory Board on Labor Relations, Inc., on September 1, 1942, signed the NWLB Agreement. This agreement (Pl. Ex. 1, Article VIII, p. 12), provides that the agreement is to take effect September 1, 1942, except that the wages, hourly rate formulae and the hourly wage rates provided for in the agreement, shall be effective retroactively to April 21, 1942, and that the formulae and the hourly rates for the period, April 21 to September 1, 1942, shall be computed on the basis of the hours provided in the Sloan Agreement (which, of course, had already been worked). This merely carried out the previous agreement of the parties and the suggestion of the Board in line with normal and sound practice in such matters.

Pursuant to the retroactive clause in the agreement, the respondents who were members of the Union were paid the retroactive increase (Pl. Ex. 6—retroactive payroll for period, April 21, 1942 to September 5, 1942, p. 35 of Exhibit Volume). All work performed from April 21, 1942 to September 5, 1942 was performed in anticipation of and subject to the new wages of which the hourly rates were an integral part. Obviously, the new hourly rates for this period could not be reflected on the current payrolls; but the rates existed and were paid nevertheless.

The Circuit Court's comment (R. p. 85) on this retroactive arrangement was unwarranted in fact or in law. Said the Court: "The attempt to make the contract consummated in September retroactive to April 20 but highlights the illusion that the new contract was more than a continuation of the old wage arrangement which did not comply with the statute. The right to overtime pay which had already accrued to these appellees could not thus be waived." Since overtime was worked during

this period, respondents were entitled to payment therefor in accordance with the Act. But the liability had not yet accrued since the wage rates governing employment for this period were still in negotiation and overtime could not possibly have been computed. "But Section 7 (a) does not require the impossible. If the correct compensation cannot be determined until some time after the regular pay period, the employer is not thereby excused from making the proper computation and payment. Section 7 (a) requires only that the employees receive a 50% premium as soon as convenient or practicable under the circumstances." *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 432.

Hence the problem for this retroactive period during which the wage and hour issues were being settled, is no different than for the period after the agreement was signed: Did the National War Labor Board Agreement properly compute the regular hourly and overtime rates?

Nor does the retroactive application of the new agreement to cover the negotiating period show a continuation of the old arrangement. Such a conclusion ignores the fundamental transition from an agreement (the Sloan Agreement) which merely fixed non-overtime wages for a fixed workweek of 47 hours without any provision for overtime within the 47 hour workweek (excepting daily overtime which was paid after 9½ hours per day) and an agreement (the NWLB Agreement) which provided for total earnings inclusive of overtime for the regular workweek in excess of the weekly wage under the Sloan Agreement, and expressly required overtime after 40 hours per week and 9½ hours per day on the basis of the hourly rate derived from an express formula.

The formula of the NWLB Agreement (following that of the Meyer Agreement) for determining the hourly rates of the respondents and the provisions for payment of wages, whether overtime or non-overtime, on the basis

of these rates, is set forth in detail at pages 27 to 30 of the Agreement (Pl. Ex. 1). The essence of the formula fixing the rates is as follows:

> "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

At the moment the agreement became effective, there was immediately fixed for each respondent a definite hourly rate: the quotient of the employee's prospective earnings for his regular workweek divided by 50.5 (hours regularly employed, or 47, plus one-half the number of hours regularly employed in excess of 40 hours, or 3.5, equals 50.5).[2] Thus the hourly rate of the respondent Peterson at the effective date of the agreement was $.544, being the quotient of $27.50, his prospective earnings for a regular workweek under the NWLB Agreement and 50.5. As demonstrated in detail later, this hourly rate was constant and determined his wages in all given situations, whether he worked less hours or more hours than his regular workweek. Peterson's hourly rate, as well as those of the other employees, thus fixed at the effective date of the agreement, changed only when his regular workweek was shortened or when his prospective earnings for his regular workweek were increased pursuant to the agreement. Such a change of rate occurred when Peterson's regular workweek changed from 47 hours per week to 46 hours per week beginning August 10, 1942, in anticipation of the signing of the NWLB Agreement. His rate then became $.561 per hour ($27.50, prospective earnings, divided by 49). His rate changed

[2] The divisor for watchmen, such as respondent McCole, whose regular workweek under the agreement was 54 hours, was 61 (54 plus one-half the hours in excess of 40, or 7, equals 61).

again as of April 21, 1943 when, pursuant to an interim arbitration award under Article III, par. 3, page 6 of the agreement, his earnings for a regular workweek were increased to $28.90. His rate then became $.589 ($28.90 divided by 49).

The individual hourly rates resulting from the NWLB Agreement were incorporated into the payrolls which the respondents signed each week without question of their correctness or validity. The payrolls show that these rates were actually applied in determining respondents' pay whether their hours exceeded or were less than the regular workweek. The Trial Court so found (R. 200-201).

Respondent members of the Union were paid retroactively pursuant to Article VIII (Pl. Ex. 1, p. 12) of the agreement. Each received an increase of $2.50 over his weekly pay under the Sloan Agreement but on the understanding that the newly agreed weekly earnings included overtime inherent in the regular workweek. The formula was then applied on the basis of the hours under the Sloan Agreement (47 hours) and the prospective earnings of $27.50 ($25 plus $2.50 increase). To illustrate, respondent Peterson, under the Sloan Agreement, worked 47 hours for a weekly wage of $25. Under the retroactive clause of the NWLB Agreement, Peterson received a $2.50 increase, bringing his earnings to $27.50—$27.50 divided by 50.5 (47 plus 3.5 hours) pursuant to the formula, equals $.544. 40 times .544 = $21.78 plus 7 times .816 (time and one-half) = $5.72, or $27.50. Respondents therefore were entitled to a retroactive payment of $2.50 for each of the regular workweeks actually worked during the period, April 21, 1942 to September 5, 1942 which they received (Pl. Ex. 6—retroactive payroll for period, April 21, 1942 to September 5, 1942, page 35 of Exhibit Volume).

For the period, September 20, 1942, to December 10, 1943, each respondent was paid on the basis of the hourly

rate appearing on the payroll records (rates for period April 21, 1943 to October 29, 1943 were later subject to a retroactive adjustment). Each weekly payroll shows the number of hours worked each day, the number of non-overtime hours (40 or less), the hourly rate, wages paid for non-overtime hours, the number of overtime hours, the basis upon which the overtime hours were compensated for, *i. e.*, 150% of the hourly rate for hours between 40 and 46 and 175% of the hourly rate for hours in excess of 46, or in excess of 9½ per day, the total number of hours worked each week and the total pay (Pl. Ex. 6, pp. 36-103 of Exhibit Volume).

A schedule is annexed to this petition as "Appendix A", showing the hourly rate (adjusted, of course, to show the two retroactive increases) for each respondent for the period April 21, 1942 to December 10, 1943. For the period, April 21, 1942 to September 5, 1942, the hourly rates were determined by the formula, using the wage increase under the NWLB Agreement plus the wages under the Sloan Agreement and the hours under the Sloan Agreement. For the period, September 20, 1942 to April 20, 1943, the hourly rates are those shown on the payroll records. For the period, April 21, 1943 to October 29, 1943, the hourly rates are those shown on the payrolls plus the increase given in October, 1943, retroactive to April 21, 1943 (Pl. Ex. 6, p. 97 of Exhibit Volume). For the period, October 30, 1943 to December 10, 1943, the hourly rates are those shown on the payroll records.

Respondents were compensated on the basis of these hourly rates for all time worked by them, whether the hours exceeded or were less than 40 hours per week.

For example, respondent Peterson was absent for inexcusable cause for three days or 23 hours during the week February 28, 1943 to March 6, 1943 (Defs. Ex. B, par. 2(b) and (c), R. 143-145). He therefore worked 23 hours and was paid $12.90 (23 hours x .561, hourly rate; see Pl. Ex. 6, p. 60 of Exhibit Volume).

It does not appear that Peterson or any other respondent was ever absent inexcusably for only part of a day during any workweek. Assuming, however, for the period August 10, 1942 to April 20, 1943 when Peterson's hourly rate was .561, that he worked only 42 hours in a given week and was inexcusably absent for 4 hours, his pay would have been computed as follows: 40 hours (regular time) x .561 (regular hourly rate) or $22.44 plus 2 hours (overtime) x .843 (overtime rate) or $1.68, making a total of $24.12 (Defs. Ex. B, R. 143).

The method of treating excusable absences is set forth in Defendants' Exhibit B, par. 2(a) (R. 141-142). During the week of December 13 to 19, 1942, Peterson worked 30 hours, being absent for excusable cause two days or 16 hours. He was paid $13.44 (24 hours x .561) plus $5.06 (6 hours x .843) or a total of $18.50 (see Pl. Ex. 6, p. 48 of Exhibit Volume). Pursuant to the Agreement, Section III, par. 5 (i), p. 29, there was deducted from Peterson's earnings, $9.00 (16 hours x .561) for these excusable absences.

Pursuant to the agreement, employees, other than watchmen, working more than 46 hours per week were paid an overtime rate of time and three-quarters. During the week of January 24, 1943 to January 30, 1943, Peterson worked six days for a total of 52 hours. For that week he received $22.44 (40 hours x .561) plus $5.06 (6 hours x .843) plus $5.88 (6 hours over 46 hours x .98, time and three-quarters) or a total of $33.38 (see Pl. Ex. 6, p. 55 of Exhibit Volume).

(d) *Analysis of Opinions Below*

While the Trial Court found as a fact that petitioners "here actually applied in all situations the hourly rates so derived" (*i. e.*, from the formula), he ruled that: "The manner in which the hourly rate is determined and not the application of an hourly rate is the test" (R. 200-201). The formula was held ineffective under Section 7(a) because: "The hourly rates derived by the use of the formula bore no relation to the regular rate of the

workweek as defined in *Overnight Motor Co.* v. *Missel*"[3] (R. 198).

In response to petitioners' attack on the Trial Court's ruling and their argument that the *Missel* formula has no application where the parties have agreed upon weekly earnings, inclusive of overtime, for a fixed regular workweek, and have also agreed upon a formula for allocating those earnings to non-overtime and overtime which is no more than a restatement of the Act's requirements, the Circuit Court said: "In the absence of any attempt to circumvent the statute we might agree" (R. p. 84). But the Circuit Court's holding of circumvention is based on nothing more than the District Court's findings (No. 18 and No. 19, R. 171-172) as to the purpose of the formula which are a repetition of the War Labor Board's description of how the formula operates.

It begs the question to say that the formula is bad because it reduces the hourly rate below what it would be if computed in the ordinary way (*i. e.*, the *Missel* formula that hourly rate equals weekly wages divided by weekly hours) "so the payment of time and a half for overtime would not bring the total weekly earnings substantially above the weekly rates set by the agreement." The question is whether anything in the Act makes the ordinary way of computation mandatory where the parties have made the type of agreement here involved.

The Circuit Court's holding that the NWLB Agreement "does negate the statutory purposes" is also based upon total disregard of the fact, as found by the Trial Court,

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[3] While the Trial Judge apparently read the formula as calling for a variable weekly rate thus explaning his comment that: "In practice the formula was not strictly followed" (R. 197), he nevertheless found that the formula rates had been applied. Between April 20, 1942 and December 10, 1943, the hourly rates remained fixed except when the agreed weekly earnings or agreed regular workweek were changed pursuant to the agreement. This practice reflected the understanding of the parties and the War Labor Board (Appendix B, Pl. Ex. 1, pp. 70-71).

that the formula rates were "actually applied in all situations." This is manifest from the Court's reference to a fixed weekly wage "seemingly transferred into an hourly rate" and to "an illusion of overtime pay after a forty hour workweek where there can be no increase in pay per workweek because of overtime unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek."[4] There is nothing "seeming" or "illusionary" about hourly rates that are actually applied.

The District Court misapprehended the true bearing of the more recent decisions of this Court dealing with Section 7(a) of the Act. The Circuit Court ignored the plain facts of the case.

Reasons for Granting the Writ

1. This case presents an important Federal question which has not been, but should be, settled by this Court.

While the decisions of the courts below are at odds with recent decisions of this Court because they fail to give effect to an hourly rate formula that meets all the tests prescribed by those cases, the instant case plainly presents a new problem.

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[4] The Circuit Court attempts to bolster its argument that the regular rate was a fixed weekly wage by reference to certain alleged payroll discrepancies not mentioned by the District Court. "The slight discrepancies were then simply ignored and the agreed weekly rate was always paid instead of what would be due under the formula" (R. *p. 84*). Obviously where an employee worked his regular workweek, the amount due under the formula was necessarily the agreed weekly earnings, which included overtime. The Circuit Court apparently refers to the fact that hourly rates and overtime rates derived from the formula were only carried to one decimal and therefore the extensions of these rates were not accurate to the exact cent. However, the existing decisions confirm petitioners' practice of carrying the hourly and overtime rates to the nearest tenth of a cent per hour. *Snyder* v. *Wessner*, 55 F. Supp. 971, 976; *Anderson* v. *Federal Cartridge Corp.*, 62 F. Supp. 775, 785.

Here employers and employees have agreed upon "take home" earnings, including overtime, for a specified regular workweek and have also agreed upon a method for allocating those earnings between non-overtime and overtime to determine compensation when an employee works less hours or more hours than the normal workweek.

Basically, the issue is whether employers and employees can in any circumstance state in their wage agreements weekly earnings for a workweek in excess of 40 hours without the employers running afoul of liability under the Act. For under the holding of the courts below, the statement of weekly earnings, even though intended by all parties to include straight time for 40 hours and time and a half for hours worked in excess thereof, is fruitless. The Act, according to the courts below, requires division of the agreed weekly earnings by the number of hours worked in order to arrive at the hourly rate. The necessary result is that, under this theory, the required payments for a workweek in excess of 40 hours will invariably exceed the amount agreed upon. And the process is an infinite one, for each time new weekly earnings are agreed upon, the hourly rate must again be computed by the *Missel* method, and a higher weekly payment made.

One fallacy of the Circuit Court rests on its premise that the test of whether an hourly rate is fictitious, and hence invalid, is whether an employee must work more than the regular workweek in order to earn an amount in excess of the agreed weekly earnings. Obviously, this cannot be the test if agreed weekly earnings, inclusive of overtime, are ever valid. Rather the test is whether the hourly rate agreed upon is in fact the rate which determines the payments to the employees. That test has been met in this case.[5]

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[5] This point is developed in point 3 of "Reasons", p. 21 below.

Brief reference to the facts of the five "hourly rate" cases so far decided by this Court shows that the type of wage agreement here involved has not been tested under the Act by this Court. In *Walling* v. *Belo*, 316 U. S. 624, the employees worked an irregular workweek and received a weekly guarantee. While, as the dissenting opinion points out (p. 637), the stated hourly rate had no demonstrable effect in determining compensation until an employee exceeded 54½ hours of work per week, this Court, by a divided vote, upheld the agreement. In *Overnight Transportation Co.* v. *Missel*, 316 U. S. 572, decided the same day as the *Belo* case, the employees also worked an irregular workweek for a fixed weekly wage. There was no stated hourly rate and no agreement that the weekly wage included overtime. The employer urged that such an agreement should be implied. This Court pointed out that: "Implication cannot mend a contract so deficient in complying with the law," the deficiencies being that there was no limit on the hours which the employer could have required the employee to work for the weekly wage and no provision for additional pay if the hours worked required minimum compensation greater than the fixed wage.

In *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, the employee was paid by the day and the employer made an arbitrary division of the normal work day for purposes of computing overtime. Thus the stated hourly rate relied upon under Section 7, bore no relation to the compensation paid for the first 40 hours worked. Indeed, as applied to employees whose normal work day was 12 hours, the stated rate had no operative effect until the employees exceeded 84 hours of work per week. In *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, and *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, while the employees were employed and paid by the hour at stated rates, they were also paid on a piece-work and incentive basis. Because of the incentive earnings,

stated hourly rates in both cases were wholly inoperative in determining the actual compensation paid.

The question presented as to whether or not the *Missel* formula is mandatory, despite the contrary agreement and practice of the parties in this case, is still an open question and has been so regarded both by this Court and an able commentator on its decisions under the Act.[6]

2. The decision below is in conflict with the decisions of the Seventh Circuit Court of Appeals in *Bergschneider* v. *Peabody Coal Co.*, 142 F. 2d 784 and the Third Circuit Court in *Shepler* v. *Crucible Fuel Co.*, 140 F. 2d 371. This Court has recently granted certiorari in *Walling* v. *Halliburton Oil Well Cementing Co.*, 152 F. 2d 622, Docket No. 1018, apparently because of a conflict among Circuits on a related question under Section 7 of the Act.

The opinions in both the *Bergschneider* and *Shepler* cases disclose that the stated hourly rates were computed as the quotient of agreed weekly earnings inclusive of overtime

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[6] "We, of course, express no opinion as to the proper computation of the regular rate under other circumstances. Nor do we intend to indicate that the formula we have used as satisfying the statutory requirements, (*i. e.*, the *Missel* formula) is the only one which respondent could adopt as complying with them." *Walling* v. *Hemerich & Payne*, footnote, p. 41.

"There was no agreement providing for an hourly rate of pay or that the weekly salary included additional compensation for overtime hours" *Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88, 93. While the *Missel* formula was there held to govern the determination of the hourly rate, the quoted language certainly suggests that it would have no application to the type of agreement here involved.

"The result (referring to *Walling* v. *Harnischfeger Corp.*) is consistent with the *Missel* case, which may be regarded as holding that, *at least in the absence of some clear provision to the contrary in the contract*, the regular rate should be ascertained by dividing total weekly earnings by hours worked." Dodd, "The Supreme Court and Fair Labor Standards, 1941-1945", 59 Harvard L. Rev. 321, 363. (Italics ours.)

[a] It would be difficult to draft a clearer "provision to the contrary" than the formula of the NWLB Agreement.

and the sum of the agreed weekly hours plus one-half the hours in excess of the statutory workweek. Certainly no sound distinction rests in the fact that there the hourly rate was expressly stated and here it had to be computed, where the computing formula is identical. Yet in both those cases the Circuit Courts found no occasion to strike down the agreements as violative of the purposes of the Act.[7]

Both courts relied on *Walling* v. *Belo*, 316 U. S. 624. While the Ninth Circuit Court of Appeals has recently followed the *Belo* opinion in *Walling* v. *Halliburton Oil Well Cementing Company*, 152 F. 2d 622, the Administrator's petition in that case, which was granted, notes a tendency in other circuits, including the Second, to limit that ruling to its precise facts. Moreover, it would appear from this Court's action in granting the petition that the Court is prepared to reexamine *Belo* and to give fresh consideration to the problems of how the "regular rate" shall be computed under Section 7(a).

Petitioners did not rely upon the *Belo* case in the Circuit Court and do not emphasize it now as a reason for granting the writ in this case. Whatever the reach of the *Belo* opinion and whatever limitations have been or may be placed upon it by the several circuits or by this Court, petitioners stand on a different and sounder footing. In *Belo* it is not easy to demonstrate that the stated hourly rate had any demonstrable effect until the employee had worked sufficient hours (54½) to earn his weekly guarantee. In our case the hourly rate derived from the

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[7] It may be claimed that a more recent case in the Third Circuit, *Watkins* v. *Hudson Coal Company*, 151 F. 2d 311, rejects a departure from the *Shepler* case. However, in the *Watkins* case, the Court found that the hourly rates derived from the formula had not been applied and were therefore fictitious (see footnote 8 at page 25 above). The formula in that case was also held bad because the rate derived did not "bear a real relation to actual earnings". This is merely another way of saying that a formula rate is invalid unless it is the rate actually paid for the non-overtime workweek, which was true of the formula rates both in the *Shepler* and the instant case.

formula was actually applied, as the District Court found, in all situations below as well as beyond the agreed workweek.

If, as we believe, the decision of the Second Circuit below conflicts with decisions of other circuits relying mainly on the *Belo* case, and if *Belo* is reexamined in the *Halliburton* case, as necessarily it must be, then it is appropriate that this case presenting a related, but not identical, problem under Section 7, should also be reviewed.

The necessity for review to clarify a somewhat confused state of decisions under Section 7(a) by the Circuit Courts and to avoid needless litigation of cases involving similar issues, is no less urgent here than in the *Halliburton* case.

3. The courts below have decided a Federal question in a way which conflicts with the decisions of this Court in *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427 and *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37.

These cases reflect a common principle emphasizing realities rather than form. The "regular rate" under Section 7(a) must be a real rate, not a fictitious one. Employers and employees are free by collective bargaining to establish the "regular rate" at any point at or above the minimum prescribed by Section 6 subject to one condition:

> "The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments."
>
> *Walling* v. *Youngerman-Reynolds Hardwood Co.*, p. 424.

"* * * we look not to contract nomenclature but to the actual payments, exclusive of those paid for overtime, which the parties have agreed shall be paid during each workweek."

Walling v. *Harnischfeger Corp.*, p. 430.

"While the words 'regular rate' are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek."

Walling v. *Helmerich & Payne*, p. 40.

If the regular rate were not computed so as to reflect all payments regularly made for non-overtime work, the statutory purposes would obviously be frustrated as pointed out by Justice Murphy in *Walling* v. *Harnischfeger Corp.* at page 430:

"To compute overtime compensation from the lower and unreceived rate is not only unrealistic but is destructive of the legislative intent. A full 50% increase in labor costs and a full 50% wage premium, which were meant to flow from the operation of Section 7(a), are impossible of achievement under such a computation."

Close reading of the opinions of both courts below discloses that the District Court and the Circuit Court do not agree as to their reasons for condemning the NWLB Agreement. The Trial Judge (R. 198-200) arbitrarily treated the weekly earnings for the regular workweek as a regular weekly wage for non-overtime hours and applied the formula of the *Missel* case, 316 U. S. 572 ("Wage divided by hours equals regular rate") as the only lawful method of computing the hourly rate. That treatment was clearly erroneous because it disregarded the agreement between the parties that the weekly earnings included all overtime inherent in the regular workweek. It also disregarded the fact that the hourly rates

derived from the formula were the rates actually paid for hours less than or more than the regular workweek, as the Trial Court found.

Under the decisions of this Court referred to above, the regular rate is computed from the regular weekly payments, "exclusive of overtime." Allocation of non-overtime earnings and overtime is precisely the function of the formula. In the formula the hourly rate (x) necessarily reflects all non-overtime payments for the regular workweek.

X (hourly rate) = earnings (including overtime) ÷ 49 (regular workweek plus half the hours exceeding 40)

Earnings (49x) = 46 X + 3 X

49 X — 3 X = 46 X

46 X (non-overtime earnings) ÷ 46 (regular workweek) = X (hourly rate)

Nothing in the *Missel* case requires its application to this case because here the earnings for the fixed regular workweek were expressly agreed upon as including overtime and a specific method for calculating the hourly rate from those earnings was also provided. The freedom of contract emphasized by the recent decisions of this Court sanctions agreements by employers and employees upon a weekly "take home" pay, including overtime and subject to reduction by formula to an hourly rate, unless the formula is merely a device to evade the Act.

If the rates derived from the formula are the rates actually paid for non-overtime hours and for overtime hours a premium of at least 50% of the formula rates is paid, then inevitably the purposes of the Act are fulfilled. So, in essence, the question remains: Were the formula rates actually used in determining regular, non-overtime pay to the employees or were they merely a

paper fiction having no demonstrable effect in determining their compensation.

Up to this point, the Circuit Court appears to agree with petitioners (R. p. 84). Its holding that there was an attempt to "circumvent the statute" is plainly based on an erroneous view of the facts, that the formula rates were not actually the rates paid for non-overtime hours. Said the Court: "It does negate the statutory purposes to base employment upon a regular unvarying weekly wage for a workweek in excess of the statutory minimum hours and then merely break that down into so-called regular and overtime hourly rates by means of a formula so the weekly wage actually definitely fixed is seemingly transferred into an hourly wage rate. That amounts but to an illusion of overtime pay after a forty-hour workweek where there can be no increase in pay per workweek because of overtime work unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek" (R. p. 85).

Thus the Circuit Court, while recogni ing that the hourly rates derived from the formula were applied for purposes of overtime beyond the agreed regular workweek of 46 hours (which, incidentally, was the only demonstrable effect of the stated hourly rate in *Walling* v. *Belo*, 316 U. S. 624) totally disregards the fact, as found by the Trial Court, that these rates were actually used in determining compensation for both non-overtime and overtime hours when the employees worked less than the regular workweek. When an employee failed to report for work without excusable cause such as illness, and worked 40 hours or less per week, he was paid only for the hours actually worked on the basis of the formula rate. While there are no instances reflected in the payrolls, if an employee in such a case worked more than 40 hours but less than 46, under the agreement he would have been paid the formula rate for the first 40 hours

worked and time and one-half the formula rate for the hours beyond 40. Where the hourly rate was applied for workweeks of less than 40 hours it cannot be assumed that the rate would have been ignored for workweeks exceeding 40 hours but less than the regular workweek of 46 hours.

These facts, ignored by the Circuit Court, demonstrate positively that the formula rates were the real rates and that the petitioners paid a 50% premium for all hours exceding 40 per week and not merely those exceeding the regular workweek of 46.

If the NWLB Agreement had been merely a continuation of the old weekly arrangement under the preceding Sloan Agreement, as suggested by the Circuit Court, any employee working less than the regular workweek of 46 hours would have been paid a proportionate share of the agreed weekly wage as under the Sloan Agreement. On the contrary, such an employee was paid on the basis of the formula rates.[8] Under the terms of the agreement there is no instance where an employee working less than the regular workweek is paid a proportionate share of the agreed weekly earnings.

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[8] In *Watkins* v. *Hudson Coal Company*, 151 F. 2d 311, 317 (C. C. A. 3) the method of deducting for all absences on a straight time or proportionate weekly basis, was regarded as significant evidence, among other factors, that the formula had not been used and that the old non-conforming wage arrangements had been continued. "It is obvious that the actual rate used was a straight-time rate and not the formula rate. Employee's wages were figured just as before. There was no application of the regular rate and overtime rate at all. Instead, there was complete reliance upon the fact that a formula had been determined and announced in writing in a wage agreement." Certiorari was denied in this case, U. S. , but no question involving the formula was presented by the petition.

In *Walling* v. *Halliburton Oil Well Cementing Co.*, 152 F. 2d 622, certiorari granted, May 13, 1946, Docket No. 1018, the Administrator's petition for a writ (pp. 5, 11) points also to the method of deducting for absences on a proportionate weekly or monthly basis as positive proof that the stated hourly rate of the employment agreement was fictitious.

4. Final and authoritative review of this case is desirable to avoid protracted and multiple litigation of the same issue in hundreds of similar cases and to settle matters of substantial importance.

The National War Labor Board Agreement which is involved in this case and the Meyer Agreement after which the challenged hourly rate formula was patterned, were in effect in New York City throughout most of the period 1942-1945. Approximately 700 loft buildings and more than 7000 employees in those buildings whose employment was governed by these agreements, are affected by the final outcome of this case.

Already hundreds of actions have been filed by employees in the Federal and State Courts in New York against the employer owners and managing agents to recover additional overtime, liquidated damages and attorneys' fees for the period 1942-1945 covered by these collective agreements. The estimated liability exceeds $10,000,000.

There are definite elements of threatened injustice implicit in this situation which should persuade this Court to exercise its discretionary right of review. The National War Labor Board Agreement with its challenged formula for computing hourly rates, was entered into in good faith by the Union and the employers' association pursuant to the Directive Order of the Board. The agreement, as acknowledged by the Board, was intended to bring the employment relationship into compliance with the Act. No private challenge of its sufficiency under the Act was made until this action was commenced in December 1943 and, then, only on the strength of this Court's decision in *Walling* v. *Helmerich & Payne* (R. 92-93). The Administrator of the Fair Labor Standards Act never challenged the NWLB Agreement during its effective period.

Review by this Court will avoid much needless litigation and will assure the parties involved that the issue has been fully and authoritatively adjudicated.

CONCLUSION

The writ of certiorari should be granted.

Dated: New York, September 12, 1946.

WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioner.

JOHN J. BOYLE,
of Counsel.

Appendix A

Hourly Rates of Respondents for Period, April 21, 1942 to December 10, 1943

Plaintiff's Name	Period	Rates Hourly
Del Rio	4/21/42— 8/ 8/42	.544
	8/10/42— 4/20/43	.561
	4/21/43—12/10/43	.589
Manne	4/21/42— 8/ 8/42	.544
	8/10/42— 4/20/43	.561
	4/21/43—12/10/43	.589
McCole	4/21/42— 6/13/42	.392
	6/15/42— 8/8/42	.401
	8/10/42—4/20/43	.45
	4/21/43—12/10/43	.473
Peterson	4/21/42— 8/ 8/42	.544
	8/10/42— 4/20/43	.561
	4/21/43— 8/ 7/43	.589
Torra	4/21/42— 8/ 8/42	.604
	8/10/42— 4/20/43	.622
	4/21/43—12/10/43	.651
J. H. Berger	4/21/42— 9/12/42	.769
	9/14/42— 3/20/43	.865
	3/21/43—12/10/43	.962
Rodriguez (Sanchez)	4/21/42— 8/8/42	.577
	8/10/42— 1/25/43	.612